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Supreme Court, U.S.
FILED

No. 95-____

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IN THE

Supreme Court Of The United States

October Term 1995

ROGER O. BROOKS, et al.,

Petitioners,

v.

UNITED AIRLINES, INC., et al.,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of the State of Colorado

PETITION FOR WRIT OF CERTIORARI

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68 pgs

QUESTIONS PRESENTED FOR REVIEW

1. Whether unrelated parties who possess no labor, contract or employment relation under the Railway Labor Act ("RLA") can fall under the preemptive purview of the Act.

2. Whether the ruling below holding that Plaintiffs' independent State-law claims against Defendants were preempted under the RLA is contrary to the express statutory provisions thereof limiting the Act's application to disputes between a carrier and its employees.

3. Whether the ruling below holding that Plaintiffs' independent State-law claims against Defendants were preempted under the RLA is contrary to this Court's decision in *Hawaiian Airlines, Inc. v. Norris*, 114 S.Ct. 2239 (1994).

4. Whether any application of preemption under the RLA is permissible when it leaves the injured parties without any state, federal or administrative remedy whatsoever and no access to any forum to resolve their claims.

5. Whether the application of preemption below constitutes an unwarranted expansion of the doctrine by, *inter alia*, extinguishing independent State-law causes of action involving unrelated parties that leaves the injured parties without any remedy.

PARTIES TO THE PROCEEDING

The Petitioners are:

ROGER O. BROOKS, CAREY F. SHARP, ROBERT L. WILLIAMS, BILL J. WATKINS, ROBERT W. VANCE, JOSEPH D. ABELL, JEFF ABRAMS, JAMES M. ACTOR, DANIEL R. ADAIR, MALCOLM C. AF UHR, JAMES H. ALLEN, III, JIM D. APPLEBY, TERRY E. ARMBRISTER, B.A. ARNOT, MICHAEL A. AVERBECK, DOUGLAS A. BADGER, DANIEL A. BAKER, THOMAS A. BANISTER, FORREST H. BAILEY, JR., JACK M. BAILEY, LAWSON E. BARCLAY, JOHN A. BATA, ROBERT G. BEABOUT, PATRICK J. BECKHAM, CHARLES E. BEVILLE, LOWELL K. BILSBOROUGH, ERIC L. BJORN, GARY G. BLANCHARD, GREGORY M. BOYER, WHITNEY A. BRANDON, RICHARD C. BRIGHT, DEAN ELTON BRISTOL, TEDDY E. BROCK, MICHAEL J. BRONOWSKI, JERRY W. BROOM, MICHAEL F. BRUMFIELD, JAMES W. BURMAN, JOHN E. BURT, MICHAEL B. BURTON, DAN J. CADY, CHARLES T. CALKINS, JAMES W. CANNON, PAUL W. CAREY, VERNE W. CARLSON, CHARLES L. CARPENTER, LLOYD D. CARR, WALLACE E. CARROLL, FRED W. CHAPMAN, DOUG E. CHRISTENSEN, ROBERT H. CHURCHILL, SAM P. CLARK, NICOLAS S. CLINGER, KENNETH COGGESHALL, HOWARD COLLING, DAVID B. COMISH, JOHN S. CONNORS, EARNEST D. COOK, DENNIS M. COXS, GARY L. CRAVEN, JON N. CROUCH, MICHAEL R. DACIEK, RICHARD P. DAKE, JOHN L. DAMERON, WILLIAM K. DENDY, GARY M. DESPAIN, MELVIN D'LOSS, DONALD D. DONALDSON, JOHN A. DUNCAN, DENTON J. DYKES, NORMAN R. EDSON, DAN C. FARLIN, WALTER A. FELIZIANETTI, JOSEPH H. FERGUSON, DENFORD D. FINKE, RICHARD R.

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The Respondents are:

UNITED AIRLINES, INC., a Delaware Corp., RICHARD J. FERRIS, JAMES J. HARTIGAN, DAVID L. PRINGLE and JOHN DOES 1 through 25,

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A. THE RULING BELOW HAS LEFT PLAINTIFFS INJURED BY VIOLATIONS OF STATE LAW WITHOUT ANY REMEDY OR RECOURSE AGAINST THESE DEFENDANTS FOR THE HARM THEY HAVE SUSTAINED 5

B. THIS RADICAL EXPANSION OF PREEMPTION BELOW HAS EFFECTIVELY GRANTED ABSOLUTE IMMUNITY FROM SUIT TO DEFENDANTS WHO ARE UNRELATED TO THE PLAINTIFFS WHOM THEY HARM 11

C. IT IS AN IMPROPER AND UNWARRANTED EXPANSION OF THE FEDERAL DOCTRINE OF PREEMPTION UNDER THE RLA TO EXTINGUISH STATE-BASED RIGHTS AND LEAVE PLAINTIFFS WITHOUT A REMEDY . . 19

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OPINIONS BELOW

The Order of the Colorado Court of Appeals (not selected for publication) dated June 16, 1994 is reprinted in the Appendix at pps. A-1 through A-20.

The Order of the Colorado Supreme Court denying *certiorari* review dated March 20, 1995 is reprinted in the Appendix at pps. A-21 through A-30.

JURISDICTION

Jurisdiction of this Honorable Court is invoked pursuant to 28 U.S.C. §§ 1254(1) and 1257(a). The Order of the Colorado Supreme Court denying *certiorari* review was entered on March 20, 1995. An extension of time within which to file this Petition was granted by Justice Breyer on June 8, 1995, up to and including August 17, 1995.

STATEMENT OF THE CASE

Petitioners herein (Plaintiffs below) are 775 former employees of Frontier Airlines, whose independent tort and contract claims arise under Colorado common and statutory law in connection with actions taken by Respondents (Defendants below) shortly before Frontier Airlines filed for Bankruptcy in 1986. Plaintiffs brought state-based causes of action against Defendants for, *inter alia*, tortious interference with contract and misrepresentation.

As part of the 1985 acquisition of Frontier Airlines by People Express Airlines, Plaintiffs negotiated a series of express contractual protections with People Express designed to protect them against third party interference with their livelihood, Frontier's assets, or Frontier's commercial viability. Among other things, these contractual protections limited the sale or transfer of Frontier's assets to another airline without Plaintiffs' consent, and provided that Frontier would be operated as a separate entity and not merged with any other air carrier. These contractual protections and guarantees were included in an agreement dated October 17, 1985 between Frontier, People Express, and Plaintiffs.

In July 1986, Defendants tortiously interfered with these contractual protections by, *inter alia*, inducing People Express to sell to United Airlines $50 million of Frontier's key operational assets and by misrepresenting Defendants' true intent not to acquire Frontier. These actions led to the financial collapse of Frontier, the termination of Plaintiffs' employment, and the damages sustained by Plaintiffs herein.

The Colorado Courts ruled that the October 17, 1985 Agreement was, in part, a collective bargaining agreement, and determined that Plaintiffs' claims required at least some interpretation of that agreement, such that all of Plaintiffs' state law claims were automatically preempted under the Railway Labor Act ("RLA"), 45 U.S.C. §§ 151 *et seq.* Because the Defendants

had no RLA relationship, no collective bargaining agreement ("CBA") and no labor agreement or relations between them and Plaintiffs, this broad application of Federal preemption left Plaintiffs without a state, federal or administrative remedy or forum to adjudicate their claims against Defendants.

Federal preemption was never designed or intended to be expansively applied in a fashion that extinguishes state-based causes of action and leaves injured Plaintiffs without a remedy. Such an unwarranted extension of Federal preemption has operated to effectively grant absolute immunity to Defendants in a way that Congress never intended. The unwarranted expansion of preemption as interpreted and applied below has allowed an inconsistent and harsh application of the doctrine that upsets the Federal balance of power and usurps the rights of States to grant their Citizens legal remedies and a forum in which to adjudicate them.

SUMMARY OF ARGUMENT

In an unbroken line of decisions over the last sixty years, culminating in the case of *Hawaiian Airlines, Inc. v. Norris*, 114 S.Ct. 2239 (1994), this Court has defined and restricted the doctrine of Federal preemption of state-based rights under the Railway Labor Act ("RLA"), 45 U.S.C. §§ 151 *et seq.*

The facts and issues of this case are uniquely qualified for *certiorari* review because this is the first instance that preemption under the RLA has been radically expanded to preclude state-based claims in a case involving unrelated (non-RLA) parties who have no labor or employment relationship, in a fashion that leaves the injured parties wholly without remedy or recourse under law.

Hawaiian Airlines cautions against failure to determine "the threshold question whether the dispute was subject to the RLA in the first instance." 114 S.Ct. at 2251. The RLA does not apply to the parties in this case. No labor or employment

relation has ever existed between these parties, nor has there ever existed any CBA or labor agreement between them. Plaintiffs are not "employees" as defined by the RLA and Defendants are not their "carrier." RLA jurisdiction over the parties' State-law dispute does not exist; Plaintiffs are statutorily prohibited from bringing an RLA action against the Defendants, and Defendants are not required or bound to arbitrate Plaintiffs' claims. How can an interpretation which preempts those very same claims against Defendants under the RLA be valid?

The Colorado Courts have unduly expanded Federal preemption beyond the statutory provisions of and Congressional intent behind the RLA in direct contravention of this Court's decisions spanning six decades and culminating in *Hawaiian Airlines*. This constitutes an injustice of inordinate magnitude.

This Court has repeatedly spoken to the issue of unwarranted expansion of Federal preemption under the RLA, and restricted the purview of this Federal statute. Nevertheless, this Court's concern has gone unheeded in the Courts below, which have granted absolute immunity to Defendants for causing compensable harm under State law to Plaintiffs.

The effect of this undue expansion of Federal preemption is three fold: First, it leaves the injured parties (Plaintiffs herein) without any state, federal or administrative remedy or recourse against Defendants for the actionable harm they have sustained; Second, it grants absolute immunity from suit to Defendants for harm caused to Plaintiffs injured by independent violation of State law; and Third, it unduly and impermissibly expands the Federal doctrine of preemption under the RLA so as to extinguish state-based rights in favor of a broad and expansive interpretation of preemption that is contrary to the decisions of this Court over the last sixty years.

ARGUMENT

A. THE RULINGS BELOW HAVE LEFT PLAINTIFFS INJURED BY VIOLATIONS OF STATE LAW WITHOUT ANY REMEDY OR RECOURSE AGAINST THESE DEFENDANTS FOR THE HARM THEY HAVE SUSTAINED

Neither the statutory purpose nor the Congressional intent behind Federal preemption under the RLA is to leave these injured Plaintiffs without a state, federal or administrative remedy or forum to adjudicate their claims. Any interpretation of the RLA which effects such a result is, as in this case, contrary to the express terms of the RLA itself, Congressional intent in enacting this statute, and the interpretive decisions of this Court over the last sixty years. It constitutes a manifest injustice and an undue extension of Federal preemption to usurp the province of state-based rights by *totally* extinguishing those rights and leaving the injured parties without a remedy.

In *Hawaiian Airlines, Inc. v. Norris,* 114 S.Ct. 2239 (1994), this Court reviewed the history and Congressional intent behind the RLA and reaffirmed the restrictive scope of RLA-based preemption. *Hawaiian Airlines* noted the somewhat contradictory nature of the debate surrounding the RLA's enactment in 1926, and observed that: "This inconclusive debate hardly calls for fashioning a broad rule of preemption."[1] *Hawaiian Airlines* also noted that, even though there is some broad phraseology in 45 U.S.C. § 152 First, "this does not compel the conclusion that all issues touching on the employment relationship must be resolved through arbitration or that all claims involving rights and duties that exist independent of the CBA are thereby preempted. Our precedents squarely reject this pervasive preemption."[2] *Hawaiian Airlines* concluded that:

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[1] 114 S.Ct. at 2245, n.4.

[2] *Id.* at n.5.

> [E]ven accepting that § 151a is susceptible of more than one interpretation, no proposed interpretation demonstrates a clear and manifest congressional purpose to create a regime that broadly preempts substantive protections extended by the states, independent of any negotiated labor agreement.[3]

No case is more representative of the "pervasive preemption" rejected in *Hawaiian Airlines* than the case at bar.

The parties in this case are not bound to arbitrate any disputes. Nor does there exist any grievance mechanism, dispute resolution, or other administrative procedure between or available to the parties in this case. These parties have no labor, employment, contractual, or statutory relationship, and Plaintiffs have no forum to redress their State-based claims against Defendants other than in the State courts below.

The Defendants are non-signatories and non-parties to the CBA between Plaintiffs and their former employer and consequently, are neither bound by nor required to arbitrate or settle any disputes with Plaintiffs under that CBA.[4] Plaintiffs' CBA with their former employer (Frontier Airlines) does not bind Defendants, nor does it define or state Defendants' rights or obligations in any fashion. Defendants had no involvement in the negotiation and execution of that CBA, nor are they intended beneficiaries thereof. Defendants are *complete strangers* to Plaintiffs' CBA with their former employer, which gives Plaintiffs no contractual, statutory, or procedural rights whatsoever

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[3] *Id.* at 2245.

[4] In *United Food and Commercial Workers Local 951 v. Mulder*, 31 F.3d 365, 368-69 (6th Cir. 1994), the Sixth Circuit rejected an expansive application of § 301 of the Labor Management Relations Act, 29 U.S.C. § 185(a), and held that "'a district court does not have subject matter jurisdiction over a non-signatory to a collective bargaining agreement, where no rights or duties of the non-signatory party are stated in the terms and conditions of the contract.'"

against Defendants, nor does it enable or authorize Plaintiffs to maintain arbitration, grievance or administrative proceedings with Defendants, including any RLA-based procedures.

The RLA itself neither applies to nor provides any dispute resolution procedure for these parties, nor does any other Federal statute. Plaintiffs' *sole* remedy against Defendants is under State law in the Courts below. No other remedy or forum exists. If the decisions below are sustained, Plaintiffs will be left without a remedy and without a forum. This is unjust, unfair, and inequitable, and contrary to what Congress intended.

It can be clearly seen from both the RLA itself and the Congressional intent behind its enactment that at no time did Congress intend the RLA to supplant free access to State courts for adjudication of State claims involving independent and unrelated parties. "Whether federal law preempts a state law establishing a cause of action is a question of congressional intent." *Hawaiian Airlines*, 114 S.Ct. at 2243. A "federal statute will be read to supersede a state's historic powers only if this is 'the clear and manifest purpose of Congress.'" *Id.* No such clear or manifest intent exists in this case.

This Court stated in *Hawaiian Airlines* that "Congress' purpose in passing the RLA was to promote stability in labor-management relations by providing a comprehensive framework for resolving labor disputes ." *Id.* The parties in this case have no "labor-management" relationship and are not seeking to resolve "a labor dispute." There is no Congressional intent in the RLA to preempt state-based causes of action in such a case.

Hawaiian Airlines reiterated the procedure by which the RLA resolves disputes between labor and management as follows:

> [The RLA] establishes a mandatory arbitral mechanism for 'the prompt and orderly settlement' of two

> classes of disputes. The first class, those concerning 'rates of pay, rules or working conditions,' are deemed 'major' disputes. Major disputes relate to 'the formation of collective bargaining agreements or efforts to secure them.' The second class of disputes, known as 'minor' disputes, 'gro[w] out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions.' Minor disputes involve controversies over the meaning of an existing collective bargaining agreement in a particular fact situation.' Thus, 'major disputes seek to create contractual rights, minor disputes to enforce them.'[5]

This case does not involve any "controversy" over any "existing" CBA between the parties. There is no past or existing CBA or any other labor agreement between the parties to this case. This case involves neither a "major" nor a "minor" dispute under the RLA. This is not a case where the RLA's operations are even at issue. Plaintiffs have never had any employment or labor relationship with Defendants, have no labor-based grievances to assert against Defendants, have no contract-based rights or remedies to assert against Defendants, and cannot compel Defendants to arbitrate this dispute. Plaintiffs' claims arise *independently* under Colorado law and can be adjudicated *only* in a judicial forum.

The RLA itself makes clear that Congress only intended to regulate (and therefore preempt) disputes between employers and their employees, and not to allow an undue expansion beyond this employment relationship. Section 152 First provides that its terms apply only to a "dispute between the carrier and the employees thereof." Section 152 Second states that only "disputes between the carrier or carriers and its or their employees shall be considered," and Section 152 Fifth provides that

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[5] *Hawaiian Airlines*, 114 S.Ct. at 2243-44 [citations omitted].

only a "dispute between a carrier or carriers and its or their employees" is being regulated under the RLA

It was never intended by Congress that the RLA provide an arbitral forum for the resolution of disputes between unrelated parties outside its statutory purview nor does the RLA by its terms allow for such an interpretation. The "RLA provides a mandatory arbitral forum for the resolution of 'disputes between an...employee...and a carrier....'" *Davies v. American Airlines, Inc.*, 971 F.2d 463, 465 (10th Cir. 1992). Thus the Sixth Circuit held in *Grand Trunk Western Railway Co. v. United Transportation Union Local Lodge 787*, 755 F.2d 931 (6th Cir. 1985) (unpublished) that the "RLA, by its terms, applies only to disputes between an employer and its employees, and not employees of a third party." Defendants herein could possibly invoke preemption against *their own* employees, but not the former employees of Frontier Airlines, the Plaintiffs herein.

In the case of *Airline Pilots Association v. United Airlines, Inc.*, 802 F.2d 886, 912 (7th Cir. 1986) *cert. denied* 480 U.S. 946 (1987), the Seventh Circuit noted that the RLA applied only to employees "while they are [employed] and subject to the protections of the RLA" and noted that, in order for the RLA to apply, there must be a dispute which "arose within the employer-employee relationship and could therefore be adjudicated under the Act." The Seventh Circuit also held that unless "a person has performed services for the employer under that employer's supervision he is not an employee for purposes of the RLA," and concluded that:

> It would be in direct contravention of the RLA's definition of employee to conclude that a person may become an employee even though he never performed any work for the employer and was never under that employer's direct supervision.[6]

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[6] *Airline Pilots' Association*, 802 F.2d at 913.

That the RLA was never intended by Congress to preemptively apply to independently situated and unrelated parties outside its scope is also apparent from the RLA's definition of an "employee" as a "person in the service of a carrier (subject to its continuing authority to supervise and direct the manner and rendition of his service) who performs any work defined as that of an employee or subordinate official...." 45 U.S.C. § 151 Fifth. It is undisputed in this case that the Plaintiffs were never "in the service of" the Defendants, nor that the Defendants ever had, at any time, any "continuing authority to supervise and direct the manner of rendition of service" by any of the Plaintiffs. Simply stated, the parties in this case were total strangers until the events transpired which led to the legal claims brought by Plaintiffs in the Courts below.

Hawaiian Airlines also made clear that the term "grievances," like disputes over "the interpretation or application" of CBAs, "refers to disagreements over how to give effect to the bargained-for agreement." 114 S.Ct. at p. 2244. Defendants have no internal dispute-resolution processes or adjustment board established by Defendants and its unions that involve or apply to Plaintiffs. *Hawaiian Airlines* noted that the adjustment boards charged with administration of the minor-dispute provisions under the RLA have understood those provisions "as pertaining only to the disputes invoking contract-based rights," i.e., disputes between management and its employees in accordance with the existing and controlling CBA. *Id.* Again, the parties in this case have no "management-employee" relationship and there is no existing or controlling CBA between them, and never has been.

The inordinately harsh result which the extinguishment of Plaintiffs' state-based causes of action creates was never contemplated by Congress in passing the RLA, nor can such an intent be found anywhere in its provisions. To effect a radical expansion of preemption under the RLA to include inde-

pendently situated and unrelated parties having no relationship under the RLA is contrary to Congressional intent, but to do so in such a way that *completely* extinguishes the injured Plaintiffs' sole available remedy under State law is a manifest injustice which must not be countenanced.

B. THIS RADICAL EXPANSION OF PREEMPTION BELOW HAS EFFECTIVELY GRANTED IMMUNITY FROM SUIT TO DEFENDANTS WHO ARE UNRELATED TO THE PLAINTIFFS WHOM THEY HARM

Although the uniform interpretation of CBAs is an important consideration in cases where (unlike here) employers and their employees seek to resolve their grievances, nowhere in the statutory scheme of the RLA did Congress display an intent to expand the scope of Federal preemption to independently situated parties outside the RLA having no labor, employment, statutory or contractual relationship with each other. This is not a labor case and the parties are not in any employer-employee relationship. Uniform interpretation of CBAs is not an issue in this case.

It is clear from the RLA itself that Congress intended the Act to apply only to disputes between "the carrier and the employees thereof," and absent a clearly expressed Congressional intent to the contrary, the statutory language of the RLA should be regarded as conclusively prohibiting the expansion of its purview beyond its stated terms..[7] The restrictive scope of the RLA was never intended to apply beyond its *limited* reach, nor has this Court ever allowed generalized notions of uniform interpretation of labor contracts or CBAs to override the explicit

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[7] *See generally, Consumer Products Safety Commission v. GTE Salvania, Inc.* 477 U.S. 102, 108 (1980); *Nelson v. Piedmont Aviation, Inc.*, 750 F.2d 1234, 1236 (4th Cir. 1984). *cert. denied* 471 U.S. 1116 (1985).

statutory language of the RLA. *See, e.g., Hawaiian Airlines, supra*.[8]

Although there are a few decisions that were relied on below to support the unwarranted extension of Federal preemption in this case (which decisions are discussed *infra*), there is no authority for holding that independently situated and unrelated parties having no labor, statutory, or contractual relationship are subject to the preclusive effect of Federal preemption under the RLA. To hold otherwise would transgress the decisions of this Court, contravene the Congressional intent of the RLA, and leave injured plaintiffs with no remedies. Yet that is precisely what has occurred below.

Indeed, the *Hawaiian Airlines* decision has already had a significant effect on Federal Courts across the country, and has led to a proper return to the restrictive scope of preemption under the RLA. *See, e.g., Felt v. Atchison, Topeka & Santa Fe Railway Co.*, Lexis 19349 (9th Cir. July 25, 1995). The RLA does not preclude or preempt litigation of state-law causes of action by independent parties who possess no statutory relationship under the RLA.

Additionally, no labor policy considerations underlying the RLA are implicated by this case, which involves independent parties unrelated by any labor or contractual relationship. Nor is any fundamental labor policy furthered by granting immunity from suit to independent third parties who tortiously interfere with labor contracts, as the Sixth Circuit succinctly noted in *Dougherty v. Parsec, Inc.*, 872 F.2d 766, 771 (6th Cir. 1989):

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[8] It cannot be overemphasized that the parties in this case are not involved in any contractual or labor dispute, and there is no contractual or labor relationship between them. Plaintiffs are not asserting contract or labor rights against the Defendants. Allowing Plaintiffs' state-based causes of action to proceed against the Defendants will neither affect nor modify the prior contractual relationship between Plaintiffs and their former employer.

> [I]t would not further the policies of either the Congress in enacting the federal labor statutes, or the Supreme Court in *Lueck* [*Allis-Chalmers v. Lueck*, 471 U.S. 202 (1985)] to give a third party who has allegedly interfered with a labor contract what effectively amounts to immunity.'...'Immunity' what be the result if the Court found the claim preempted...Finding that the claim is not preempted would allow the Plaintiff to bring the state law claim in federal court based upon diversity.

Immunity would be the result in this case if the decisions below are sustained and Plaintiffs' claims are found to be preempted. The RLA does not grant immunity to third parties who tortiously interfere with contractual relationships between other parties.

The Colorado Courts below cited five Federal circuit decisions as authority for the proposition that the preclusive effect of RLA-based preemption could be expanded to include the complete extinguishment of State causes of action involving independently situated parties who have no labor or employment relationship under the RLA: *International Union, United Mine Workers of America v. Covenant Coal Corp.*, 977 F.2d 895 (4th Cir. 1992); *Dougherty v. Parsec, Inc.*, 872 F.2d 766 (6th Cir. 1989); *Milne Employees Association v. Sun Carriers, Inc.*, 960 F.2d 1401 (9th Cir. 1991); *Baylis v. Marriott Corp.*, 906 F.2d 874 (2nd Cir. 1990); and *Brotherhood Railway Carmen v. Missouri Pacific R.R. Co.*, 944 F.2d 1422 (8th Cir. 1991).[9]

These cases contain little support for the broad proposition that the scope of Federal preemption under the RLA is intended to expansively apply to unrelated parties in the course of adjudicating state-based causes of action in a fashion that leaves the injured party without a state, federal or administrative remedy.

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[9] Appendix at pp. A-14 through A-15.

The necessity of a remedy was explicitly acknowledged by the Fourth Circuit in the *International Union* case as follows:

> We are cognizant of the apparent paradox, inherent in our decision of this case, holding that Section 301 of the LMRA bars a federal cause of action for tortious interference with contracts, yet simultaneously preempts the identical state law cause of action. *This result is not as harsh as it would initially appear, however, because the Union is not left without a remedy.* First, the Union remains free to bring suit directly against the mining companies for breach of the bargaining agreements. Second, and more closely analogous to the present action, the Union retains the right to proceed against Convenent by means of an unfair labor practice charge before the National Labor Relations Board. *Because an adequate forum exists for resolution of the Unions' claims, we discern no injustice in the finding that Section 301 of the LMRA serves both to bar a federal cause of action for tortious interference with a collective bargaining agreement against a non-signatory of that agreement, and to preempt a similar cause of action premised on state law.*[10]

International Union recognized the "injustice" and the "harsh" result that would have occurred had the party subject to preemption in that case been left without a remedy. Plaintiffs submit that the result in *International Union* would have been significantly different had there been no remedy or forum for the injured party, and certainly would have been decided differently, as would the four other cases cited by the Colorado Courts, in light of this Court's later decision *Hawaiian Airlines*. *International Union* also made the following pertinent observation relative to the issue at bar:

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[10] *International Union*, 977 F.2d at 899-900 [emphasis added].

> While uniform interpretation of collective bargaining agreements is an important consideration in cases where the federal courts have expressly granted jurisdictional authority, nowhere in the statutory scheme did Congress display an intent to make such concerns determinative of the scope of federal jurisdiction. We decline to allow generalized notions of the benefits of uniform federal interpretation of labor contracts to override the explicit statutory language of Section 301 that limits federal jurisdiction to 'suits for violation of [labor] contracts.'[11]

In *Dougherty*, another decision relied on below, the Sixth Circuit *rejected* preemption consistent with the lack of any policy considerations in uniform application of Federal law inherent in cases involving parties unrelated by any labor agreement or CBA:

> One of the basic concerns of the Supreme Court in *Allis-Chalmers v. Lueck*, 471 U.S. 202, 105 S.Ct. 1904, 85 L.Ed.2d 206 (1985) was that application of state law to labor contract terms would result in uncertainty in contract negotiations and increase the number of disputes in contract interpretation. *Here, allowing a state law action to proceed against a party who has not signed a labor contract, and whose obligations are not defined by the contract, will neither define nor modify the contractual relationship between the employer or the union...*
>
> Another major policy underlying *Lueck* was the concern that permitting state law claims would allow Plaintiff to avoid the fundamental labor policies that contract disputes should be decided by arbitrators in the first instance. *'That is not a problem where a tortious interference with contract claim is being*

[11] *Id.* at 898.

> *made against a non-signatory' because the non-signatory is not bound by the contract (hence not bound to arbitrate).*[12]

Dougherty further emphasized that "'it would not further the policies of either the Congress in enacting the federal labor statutes, or the Supreme Court in *Lueck*, to give a third party who has allegedly interfered with a labor contract what effectively amounts to immunity,'" and found that immunity would indeed be the result if the Court determined that preemption should be applied. 872 F.2d at 771.

By the same token, the notion of uniform federal interpretation of labor contracts relied on by the Colorado Courts below in preempting Plaintiffs' claims has operated to impermissibly override the explicit statutory language of the RLA that limits its purview to disputes between employers and their employees arising out of existing CBAs, and which was never intended by Congress to operate as a *complete bar* to the ability to redress an actionable injury.

Equally conspicuous by its absence from the holding below was any analysis or consideration of the fact that such a broad expansion of preemption would leave the Plaintiffs without any state, federal or administrative remedy whatsoever, nor was any consideration given to the fact that such an interpretation of Federal preemption would operate to grant the Defendants absolute immunity from liability for their actions. *International Union* expressly noted the existence of separate remedies available to the injured parties, and *Dougherty* rejected any interpretation of preemption that granted immunity to a Defendant. To the extent any of the pre-*Hawaiian Airlines* cases relied on by the Courts below justify the broad expansion of preemption to encompass the Plaintiffs herein, those decisions are contrary to Congressional intent in the RLA, and impermissibly conflict with this Court's decision in *Hawaiian Airlines*.

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[12] *Dougherty*, 872 F.2d at 770-71.[emphasis added].

Such an interpretation of the RLA would remove any real limits on Federal preemption, because, depending on the level of generality, virtually *any* suit against *any* air carrier by *any* injured Plaintiff subject to an unrelated CBA could be viewed as preempted. There would no longer be any outer limits to Federal preemption under the view taken by the Colorado Courts, an expansive interpretation that would bring virtually *all* suits tangentially involving labor into the preclusive arena of Federal preemption, leaving injured Plaintiffs with no rights or remedies and granting absolute immunity to Defendants for their actions.

The "inherent uncertainty" with which some courts have approached the question of Federal preemption, and the inconsistent holdings which have resulted, is no basis for the extinguishment of these Plaintiffs' State-based rights and causes of action. This expansive interpretation of the RLA allows this Federal statute to foreclose the States from providing their Citizens with enforceable legal rights, and it does so by regulating an activity beyond the realm of Congressional intent as defined in the RLA.

Neither this Court nor Congress has ever said that the RLA may reach so far as to displace independent State-based rights and causes of action in a fashion that usurps the traditional province of the States and upsets the Federal balance to such a degree that legitimately injured Citizens are totally deprived of a remedy or a forum to redress their damages. *Hawaiian Airlines* stands for the proposition that application of a broad and expansive version of preemption to extinguish independent rights is impermissible. *Hawaiian Airlines* specifically noted that in *Andrews v. Louisville & N.R. Co.*, 406 U.S. 320 (1972), this "Court held that a state law claim of wrongful termination was preempted, *not* because the RLA broadly preempts state law claims based on discharge or discipline, but because the employee's claim was firmly rooted in a breach of the CBA itself.

He asserted no right independent of that agreement." 114 S.Ct. at 2246 [emphasis in original]. The Court in *Hawaiian Airlines* quoted from the *Andrews* decision the following language:

> "Here it is conceded by all that the *only source* of [Andrews'] right not to be discharged, and therefore to treat an alleged discharge as a 'wrongful' one that entitled him to damages, is the [CBA]....[T]he disagreement turns on the extent of [the railroads'] obligation to restore [Andrews] to his regular duties following injury in an automobile accident. The existence and extent of such an obligation in a case such as this will depend on the interpretation of the [CBA]. Thus, [Andrews] claim and the [railroad's] disallowance of it, stem from differing interpretations of the [CBA]....His claim is therefore subject to the Act's requirement that it be submitted to the Board for adjustment."[13]

Here, in contrast, Plaintiffs' CBA with their former employer is not the "only source" of Plaintiffs' rights not to have their contractual obligations tortiously interfered with by unrelated third parties. Indeed, the "only source" of the rights asserted by Plaintiffs in this case is State tort law. Wholly apart from any provision of Plaintiffs' CBA with their former employer, Defendants had an obligation under State law *not* to tortiously interfere with that agreement. If the rulings below are correct, then parties to a CBA have no defense against third party interference. Ever.

There is no interpretation of the RLA which can demonstrate a clear and manifest Congressional intent to create a preclusive regime that broadly preempts substantive protections extended by the States independent of any labor agreement, or which opens the door to third party interference of CBAs with impunity. *Hawaiian Airlines*, 114 S.Ct. at 2245-46. As the

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[13] *Id.* at 2246 [emphasis original].

Court held in *Allis-Chalmers v. Lueck*, 471 U.S. 202, 211-212 (1985):

> Of course, not every dispute concerning employment or tangentially involving a provision of a collective-bargaining agreement is preempted by § 301 or other provisions of the federal labor law...[I]t would be inconsistent with congressional intent...to preempt state rules that proscribe conduct, or establish rights and obligations, independent of a labor contract.

This Court has held that, even where there exists a CBA-based remedy, that does not deprive an employee of independent remedies available under State law. *Hawaiian Airlines*, 114 S.Ct. at 2247 (citing *Lingle v. Norge Division of Magic Chef, Inc.*, 486 U.S. 399 (1988)). The case is even stronger and more compelling in a situation where there is no CBA-based remedy and the parties stand as strangers to each other outside the purview of the RLA or any existing CBA or labor agreement.

C. IT IS AN IMPROPER AND UNWARRANTED EXPANSION OF THE FEDERAL DOCTRINE OF PREEMPTION UNDER THE RLA TO EXTINGUISH STATE-BASED RIGHTS AND LEAVE PLAINTIFFS WITHOUT A REMEDY

Chief Justice Rehnquist succinctly described the "first principles" inherent in balancing the application of Federal statutes and States' rights in *United States v. Lopez*, 115 S.Ct. 1624, 1626 (1995) as follows:

> We start with first principles. The Constitution creates a Federal Government of enumerated powers. As James Madison wrote '[t]he powers delegated by the proposed Constitution to the Federal Government are few and defined. Those which are to remain in the state governments are numerous and indefinite.' This constitutionally mandated division of authority 'was

> adopted by the Framers to insure protection of our fundamental liberties.' 'Just as the separation and independence of the coordinate branches of the Federal Government serves to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front.' [citations omitted]

Noting that "'[f]ederalism serves to assign political responsibility, not to obscure it,'" Justice Kennedy, with whom Justice O'Connor joined and concurred, stated:

> Were the Federal Government to take over the regulation of entire areas of traditional state concern, areas having nothing to do with the regulation of commercial activities, the boundaries between the spheres of federal and state authority would blur and political responsibility would become illusory.[14]

Although the *Lopez* decision dealt with the undue expansion of Congress' Commerce Clause authority, Justice Kennedy described the whole subject of the Federal and State balance as follows:

> In the past this Court has participated in maintaining the federal balance through judicial exposition of doctrines such as abstention, the doctrine of adequate and independent state grounds, the whole jurisprudence of preemption, and many of the rules governing our habeas jurisprudence.[15]

Hawaiian Airlines sets the tone for the *appropriate* application of Federal preemption under the RLA and consistently keeps preemption narrow and restrictive. *Hawaiian Airlines* requires a determination of the "threshold question whether the

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[14] *Lopez*, 115 S.Ct. at 1638.

[15] *Lopez*, 115 S.Ct. at 1639. [citation omitted]

dispute was subject to the RLA in the first place," a question unequivocally answered in the negative in this case. The all too common tendency of the lower courts to unduly broaden the application of Federal Statutes beyond their terms or authority was conclusively rejected, in different situations, in *Lopez* and *Hawaiian Airlines*. For the past sixty years, this Court has limited the application of Federal preemption under the RLA and now must do so again. Plaintiffs call upon this Court to confirm that Federal preemption under the RLA has real limits that cannot be unduly broadened by the generalized notion that uniformity of application of Federal statutes takes precedence over the rights of the States to grant their Citizens legal remedies and the forums in which to pursue them.

The question submitted in this case is the same one posed by Chief Justice Marshall in *McCulloch v. Maryland*, 4 Wheat. 316, 405, 4 L.Ed. 579 (1819):

> The [federal] government is acknowledged by all to be one of enumerated powers. The principle that it can exercise only the powers granted to it...is now universally admitted. But the question respecting the extent of the powers actually granted, is perpetually arising, and will probably continue to arise as long as our system shall exist.[16]

CONCLUSION

There is no more insidious usurpation of States' rights than the gradual encroachment thereon by an ever-expanding application of Federal statutes. The Federal Government possesses only those enumerated powers which the States have granted it, and at no time, in any statute or portion of Congressional record, can there be found any intent or grant of right to preclusively extinguish state-based causes of action by injured Plaintiffs

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[16] *See, e.g., Lopez*, 115 S.Ct. at 1633 (citing Chief Justice Marshall in *McCulloch v. Maryland*, 4 Wheat. 316, 4 L.Ed. 579 (1819)).

against unrelated Defendants that leaves those Plaintiffs without a state, federal or administrative remedy or a forum.

Plaintiffs pray for the grant of *Certiorari* to review the issues in this case and reverse the Courts below, to enforce the mandate of *Hawaiian Airlines*, and to define Federal preemption under the RLA as intended by Congress.

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COLORADO COURT OF APPEALS June 16, 1994

No. 92CA1657
No. 92CA1723 NOT SELECTED FOR PUBLICATION

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Plaintiffs,

v.

UNITED AIRLINES, INC. a Delaware Corp., RICHARD J. FERRIS, JAMES J. HARTIGAN, DAVID L. PRINGLE and JOHN DOES 1 through 25.

Defendants.

Appeal from the District Court of the City
and County of Denver
Honorable H. Jeffrey Bayless, Judge
No. 88CV13521
No. 88CV13524
No. 88CV16656
No. 88CV16658
No. 88CV21047

Division V JUDGEMENT AFFIRMED

Opinion by JUDGE MARQUEZ
Davidson and Briggs, JJ., concur

Kenneth A. Roberts, P.C., Kenneth A. B. Roberts, Jr., Denver, Colorado; Retrum, Retrum & Donaldson, Craig W. Donaldson, Lakewood, Colorado; Richard S. Shafer, Aurora, Colorado; Waller & Mark, P.C. William C. Waller; Denis H. Mark, Denver, Colorado, for Plaintiffs-Appellants.

Davis, Graham & Stubbs, Dale R. Haris, M. James Grode, Denver, Colorado; O'Melvany & Myers, Chris Hollinger, Robert A. Siegel, Los Angeles, California, for Defendants-Appellees

In this consolidated action, plaintiffs, approximately 775 former employees of Frontier Airlines, Inc. (Frontier), appeal a summary judgment in favor of defendants, United Airlines, Inc. (United), a Delaware Corp., Richard J. Ferris, James J. Hartigan and David L. Pringle. We affirm.

This dispute centers around two contracts involving plaintiffs, Frontier, United, and People Express, Inc. (People). The first contract was entered into on October 17, 1985 (October 1985 Agreement) between People, Frontier and the Frontier unions, of which are generally considered collective bargaining terms. *See* 45 U.S.C. § 151a (1988).

Other sections of this contract address subjects that, according to plaintiffs, are not collective bargaining terms. As stated by plaintiffs, this non-collective bargaining portion was designed to"provide a security package with specific contractual protections for plaintiffs against any restructuring of Frontier or the unapproved sale or disposal of Frontier's assets." Two such provisions provide:

> 9. No Merger - People and Frontier agree that Frontier will not be merged, consolidated or otherwise combined with any other airline, and that Frontier employees will not be merged with employees of any other airline, regardless of otherwise permitted corporate or airline relationship action, and that Frontier will be operated as a separate entity with its own name, colors, and uniforms until at least February 1, 1990.
>
> 12. Sale of Holdings/Airlines/Frontier. People agrees that it will not voluntarily sell or agree to sell all or part of the stock of Frontier, or grant any proxy with respect to the stock of Frontier, or voluntarily take any action with respect to the stock of Frontier, or voluntarily take any action to permit Frontier to issue a material amount of common stock of Frontier,

> or enter into any transaction for the sale, transfer or control of all or a material amount of the assets or business of Frontier, whether by merger, consolidation, or otherwise, directly or indirectly to any air carrier which at the date hereof is operating under the protection of the federal bankruptcy laws or any other affiliate of such a carrier.

In addition, paragraph 11 of the October 1985 agreement restricts the ability of People to sell Frontier's assets. That paragraph provides in pertinent part:

> Based on the existing pool of assets, during the term of this Agreement, Frontier will not sell or otherwise dispose of assets, including sales or dispositions in the ordinary sales or dispositions in the ordinary course of business, in excess of aggregate proceeds of $25 million....
>
> ***
>
> In entering into this Agreement, People intends that Frontier shall be a viable entity, that Frontier be strengthened as an airline, and that Frontier experience profitable growth, and People and Frontier shall make every reasonable effort to accomplish the foregoing. In addition, given profitable growth at Frontier, People shall endeavor and make every reasonable effort to promote and expand both Frontier and People Express Airlines, Inc. at approximately proportional rates.

The second contract was entered into on July 10, 1986, between United and People, and it provided for the sale of Frontier by People to United. Although plaintiffs were not a party to this Agreement, the agreement provides that United's purchase of assets described in the agreement"shall be subject to (1) any approvals of Frontier unions required pursuant to

paragraph 11 of the agreement dated October 17, 1985, between People, Frontier, and the Frontier unions...."

In this action, plaintiffs assert claims for tortious interference with the October 1985 agreement, breach of contract/third party beneficiaries, outrageous conduct, and fraud and misrepresentation.

Previously, United filed motions to dismiss plaintiffs' complaints pursuant to C.R.C.P. § 12(b)(1) and 12(b)(5). United argued that plaintiffs' state law claims were preempted by the Railway Labor Act, 45 U.S.C. § 151, et seq. (1982)(RLA), and these motions were granted. On the prior appeal, a different division of this court held that"absent a determination pursuant to C.R.C.P. 56, we are unable to dispose of the contract issues as a matter of law under the doctrine of preemption,"and reversed and remanded the consolidated actions for further proceedings. However, that division determined that the October 1985 agreement is"in part"a collective bargaining agreement. *See e.g., Brooks v. United Airlines, Inc.*, (Colo. App. No. 89 CA 1572, February 14, 1991)(not selected for publication).

On remand, plaintiffs filed amended complaints and United filed a motion for summary judgment which the trial court granted. The trial court concluded that the October 1985 agreement was an un-severable collective bargaining agreement under the purview of the RLA, that United had standing to assert an RLA-based preemption defense, and that plaintiffs' claims were preempted as a matter of law. We address these issues in order.

I.

Plaintiffs contend that the trial court erred by treating the court of appeals' statement that the October 1985 agreement"is, in part, a collective bargaining agreement"as the law of the case. We disagree.

The pronouncement of an issue in a case presented to it becomes the law of the case. *People v. Roybal,* 672 P.2d 1003 (Colo. 1983). This rule, however, does not extend to matters other than those which in fact were decided upon issues presented and considered in the initial review. *Dando Co. v. Mangini,* 107 Colo. 170, 109 P.2d 1055 (1941).

Here, the determination was made as a matter of law and was designed to guide the trial court on remand. Moreover, we agree with the determination that the October 1985 agreement is, at least in part, a collective bargaining agreement because, as stated in 45 U.S.C. § 151(a) 152 (1988), it is an agreement"concerning rates of pay, rules, and working conditions."

II.

We further conclude that the trial court properly determined that the contract is a whole and is not severable.

The primary objective in the severability inquiry is to ascertain the intent of the contracting parties. The relevant question is whether a number of promises constitute one contract or more than one, and such issue is to be determined by inquiring whether a number of promises constitute one contract or more than one, and such issue is to be determined by inquiring whether the parties assented to all the promises as a single whole, so that there would have been no bargain whatever if any promise or set of promises were struck out. *John v. United Advertising, Inc.*, 165 Colo. 193, 439 P.2d 53 (1968).

Here, the trial court ruled that continued labor concessions were the consideration for the promise not to merge or sell off assets of the airline. It further noted that the written contract contained no indication of the intention of the parties for the contract to be severable.

We thus conclude that the trial court properly determined that the contract was not severable.

III.

The dispositive determination thus becomes whether plaintiffs' claims are preempted as a matter of law. We conclude, as did the trial court, that they are preempted.

In determining whether federal preemption exists under the RLA, the federal circuits have turned to the test announced under § 301 of the Labor Management Relations Act of 1947, 29 U.S.C. § 185(a)(1988). *See Baylis v. Marriott Corp.*, 906 F.2d 874 (2d Cir.. 1990); *Beard v. Carrolltron R.R.*, 893 F.2d 117 (6th Cir. 1989).

Under § 301,"if the resolution of a state-law claim depends upon the meaning of a collective-bargaining agreement, the application of state law (which might lead to inconsistent results since there could be as many state-law principles as there are states) is preempted...." *Lingle v. Norge Division of Magic Chef, Inc.*, 486 U.S. 399, 405-06, 108 S.Ct. 1877, 1881, 100 L.Ed.2d 410, 426 (1988) (*citing Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 105 S.Ct. 1904, 85 L.Ed.2d 206 (1985)).

The pertinent question in regard to preemption is whether"the state-law claim[s] can be resolved without interpreting the agreement itself." *Lingle v. Norge Division of Magic Chef, Inc. supra,* 486 U.S. at 410, 108 S.Ct. at 1883, 100 L.Ed.2d at 421.

A.

First, however, relying on 45 U.S.C. § 152, which addresses"any dispute between the carrier and the employees thereof,"plaintiffs contend that the Railway Labor Act, by its terms, applies only to collective bargaining issues between an employer and its employees, and not employees of a third party. Plaintiffs assert that the dispute in this action is between United Airlines and former employees of Frontier Airlines and that the RLA precludes preemption. We disagree.

The preemption analysis set fourth in *Lingle* has been applied in cases involving claims against a nonsignatory to a collective bargaining agreement. *See International Union, United Mine Workers of America v. Covenant Coal Corp.*, 977 F.2d 895, 899 (4th Cir. 1992) ("holding that Section 301 of the LMRA bars a federal cause of action for tortious interference with contract, yet simultaneously preempts the identical state law cause of action:"); *Dougherty v. Parsec, Inc.*, 872 F.2d 766 (6th Cir. 1989) (holding that a state-law claim for tortious interference with a business relationship was not preempted under the *Lingle* test); *see also Milne Employees Ass'n v. Sun Carriers, Inc.*, 960 F.2d 1401 (9th Cir. 1991) (holding that a non-signatory to a CBA has standing to remove a case on the basis of section 301 preemption if resolution of the state law claim requires interpretation of the collective bargaining agreement and, then, applying the *Lingle* test to the state-law claims raised); *Baylis v. Marriott Corp., supra* (holding that a state-law claim for tortious inducement or breach of contract was preempted); *Brotherhood Railway Carmen v. Missouri Pacific R.R. Co.*, 944 F.2d 1422 (8th Cir. 1991) (holding that tortious interference claims was preempted).

Further, we conclude that United has standing to raise this defense.

Because of our resolution of this issue, we need not address plaintiffs' claim that the trial court erred by applying the law of the case doctrine to conclude that United has standing to raise a preemption defense.

B.

We now turn to plaintiffs' claims and apply the *Lingle* test. Here, plaintiffs' first claim for relief is for intentional interference with contractual relations.

This tort has been defined as follows:

> One who intentionally and improperly interferes with the performance of a contractbetween another and a third person by inducing or otherwise causing the third person not to perform the contract, is subject to liability to the other for the pecuniary loss resulting to the other from the failure of the third person to perform the contract.

Memorial Gardens, Inc. v. Olympian Sales & Management Consultants, Inc., 690 P.2d 207, 210 (Colo. 1984); *See Dougherty v. Parsec, Inc., supra.*

In their amended complaints, plaintiffs allege that United tortiously interfered with the October 1985 agreement by"wrongfully converting indispensable Frontier assets with the intended and foreseeable result that plaintiffs would be irreparably damaged." Plaintiffs further contend that"[b]y wrongfully obtaining Frontier's key assets, and then reneging on the Agreement [presumably the July 1986 Agreement] to purchase the stock and integrate the employees, United destroyed all Frontier operations and assure the nonexistence of the jobs of the plaintiffs." In plaintiffs' response to United's motion for summary judgment on the issues of preemption, they contend that United tortiously interfered with the October 1985 agreement by inducing People to violate the agreement.

The underlying basis for the claim appears to be that People sold Frontier's assets to United either because 1) United tortiously induced People to enter into the July 1986 agreement and fraudulently induced plaintiffs to approve the agreement which resulted in a violation of plaintiffs' rights under the October 1985 agreement; or 2) United tortiously induced People to enter into the July 1986 agreement and without obtaining plaintiffs' approval, in violation of plaintiffs' rights under the October 1985 agreement.

In either case, plaintiffs' rights under this claim for relief stem from those terms of the October 1985 agreement which

define or integrally involve plaintiffs' working conditions and consideration provided for plaintiffs' acceptance of those working conditions. In our view, the state-law claim could not be determined without deciding plaintiffs' continuing rights and obligations under the October 1985 agreement.

Moreover, plaintiffs' claim ultimately requires a determination of the continuing validity of the October 1985 agreement. We recognize that this presents a different question than that of interpreting the meaning of the term in an admittedly valid collective-bargaining agreement. However, the supreme court in *Lingle v. Norge Division of Magic Chef, Inc., supra*, again confirmed that the underlying rationale in preempting state-law claims is to avoid inconsistent results under collective-bargaining agreements.

In the usual case, the validity of the agreement is not in question and the issue is whether the state-law claims depends upon the meaning of terms contained in the admittedly valid agreement. However, when the state-law claim depends upon a determination of the very validity of the collective bargaining agreement, inconsistent results are no less a concern.

We therefore conclude that, in the unusual circumstances presented here, because the state-law claim would in effect depend on our determination of the validity of the July 1986 agreement, which in turn would, in effect, determine the continuing validity of the October 1985 agreement, pre-emption is equally appropriate.

C.

Plaintiffs' second claim for relief is for "Breach of Contract / Third Party Beneficiaries."

The July 1986 agreement provides:

> 2. The foregoing transaction is subject to the conclusion by no later than July 31, 1986, subject to

> ratification by the unions if required, by August 31,1 986, of agreement satisfactory to United with labor unions representing its employees and the employees of Frontier, concerning the terms and conditions applicable to United's acquisition and operation of Frontier. United agrees to use its best efforts to obtain such agreements.

In addition, United's purchase of assets under the July 1986 agreement was"subject to (1) any approvals of Frontier unions required pursuant to paragraph 11 of the agreement dated October 17, 1985."

To determine whether United breached the July 10, 1986 agreement requires an interpretation of the October 17, 1985 agreement.

Thus, we conclude that this claim is also preempted.

D.

Plaintiffs' third claim for relief is for intentional infliction of emotional distress and extreme and outrageous conduct.

Outrageous conduct is committed if, by extreme and outrageous conduct, an individual intentionally or recklessly causes severe emotional distress to another. *Rubenstein v. Sough Denver National Bank,* 762 P.d 755 (Colo. App. 1988); *CJI Civ.3d* 23:1 (1989). To qualify as outrageous, the offending conduct must go beyond all possible bounds of decency and be regarded as atrocious and utterly intolerable in a civilized community. *Churchey v. Adolph Coors*, 759 P.2d 1336 (Colo. 1988); *CJI Civ. 3d* 23:2 (1989).

In their amended complaints, plaintiffs claim that United's"acts and/or omissions and other wrongful conduct"amount to extreme and outrageous conduct. Plaintiffs do not specify particulars concerning the outrageous conduct except by incorporating previous allegations under this claim.

However, as the trial court noted:

> Plaintiffs in this case are not able to state the elements of their claim for outrageous conduct without reference to the October 17, 1985 contract. What plaintiffs are alleging, in essence, is that the outrageous act was obtaining Frontier's corporate operational assets. Even if true such action standing alone is not outrageous. It may become outrageous only in relation to a contract which prohibits such action. Therefore, under the unique facts of this case the claim of outrageous conduct would of necessity call for an interpretation of the October 17, 1985 contract.

Because the conduct here involves interpretation of a collective bargaining term, we conclude that plaintiffs' claim is preempted.

E.

In their fourth claim for relief, plaintiffs contend that United induced plaintiffs to accept and agree to the July 1986 agreement with fraudulent representations that United would not only purchase the assets of Frontier but also its stock, and would continue the business and thereby protect Frontier's employees.

The elements of fraud include: (1) a false representation of a material existing fact; (2) knowledge on the part of the one making the representation that it is false; (3) ignorance on the part of the one to whom the representation is made of the falsity; (4) intention by the one making the representation that it be acted upon; (5) and action on the representation resulting in damage. *Kinsey v. Preeson*, 746 P.2d 542 (Colo. 1987). Moreover,"[i]n all averments of fraud or mistake, the circumstances continuing fraud or mistake shall be stated with particularity." C.R.C.P. 9(b).

The crux of this claim for relief is that United used fraud or misrepresentations to induce plaintiffs' approval as required by the July 1986 agreement. Without plaintiffs' approval or waiver, the sale would violate both the October 1985 agreement and the July 1986 agreement.

Under the fifth requirement, plaintiffs must act on representation. Here, plaintiffs claim requires interpretation of the October 1985 agreement and, thus, is preempted.

The judgment is affirmed.

JUDGE DAVIDSON and JUDGE BRIGGS concur.

SUPREME COURT, STATE OF COLORADO
CASE NO. 94SC467
CERTIORARI TO THE COLORADO COURT OF APPEALS,
NO. 92CA1657 & 92CA1732
DISTRICT COURT, CITY AND COUNTY OF DENVER,
NO. 88CV13521
NO. 88CV13524, NO. 88CV16656, NO. 88CV16658,
NO. 88CV21047

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Petioners,

v.

UNITED AIRLINES, INC. a Delaware Corp., RICHARD J. FERRIS, JAMES J. HARTIGAN, DAVID L. PRINGLE and JOHN DOES 1 through 25.

Respondents.

Upon consideration of the Petition for Writ of Certiorari to the Colorado Court of Appeals, and after review of the record, the briefs, and the judgement of said Court of Appeals,

IT IS THIS DAY ORDERED that said Petition for Writ of Certiorari shall be, and same hereby is DENIED.

BY THE COURT, EN BANC, MARCH 20, 1995.
JUSTICE SCOTT does not participate.

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